

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

SUN VALLEY FARMS, LLC,
Plaintiff-Appellant,
v.
WESTERN VEG PRODUCE, INC.,
Defendant-Appellee

CASE NO. 1:20-CV-1665 AWI JLT

**ORDER ON DEFENDANT’S MOTION
FOR SUMMARY JUDGMENT**

(Doc. No. 28)

This is an appeal under 7 U.S.C. § 499g(c) of the Perishable Agricultural Commodities Act (“PACA”) by Plaintiff-Appellant Sun Valley Farms, LLC (“Sun Valley”) from a decision by the Secretary (the “Secretary”) of the United States Department of Agriculture (“USDA”). Currently before the Court is Defendant-Appellee Western Veg Produce, Inc.’s (“Western Veg”) motion for summary judgment. For the reasons that follow, Western Veg’s motion will be denied.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Fortyune v. American Multi-Cinema, Inc., 364 F.3d 1075, 1080 (9th Cir. 2004). The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying the portions of the declarations (if any), pleadings, and discovery that demonstrate an absence of a genuine

1 issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Soremekun v. Thrifty
 2 Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007). A fact is “material” if it might affect the outcome
 3 of the suit under the governing law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49
 4 (1986); United States v. Kapp, 564 F.3d 1103, 1114 (9th Cir. 2009). A dispute is “genuine” as to
 5 a material fact if there is sufficient evidence for a reasonable jury to return a verdict for the non-
 6 moving party. Anderson, 477 U.S. at 248; Freecycle Sunnyvale v. Freecycle Network, 626 F.3d
 7 509, 514 (9th Cir. 2010).

8 Where the moving party will have the burden of proof on an issue at trial, the movant must
 9 affirmatively demonstrate that no reasonable trier of fact could find other than for the movant.
 10 Soremekun, 509 F.3d at 984. Where the non-moving party will have the burden of proof on an
 11 issue at trial, the movant may prevail by presenting evidence that negates an essential element of
 12 the non-moving party's claim or by merely pointing out that there is an absence of evidence to
 13 support an essential element of the non-moving party's claim. See James River Ins. Co. v. Herbert
 14 Schenk, P.C., 523 F.3d 915, 923 (9th Cir. 2008); Soremekun, 509 F.3d at 984. If a moving party
 15 fails to carry its burden of production, then “the non-moving party has no obligation to produce
 16 anything, even if the non-moving party would have the ultimate burden of persuasion at trial.”
 17 Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102-03 (9th Cir. 2000). If the
 18 moving party meets its initial burden, the burden then shifts to the opposing party to establish that
 19 a genuine issue as to any material fact actually exists. See Matsushita Elec. Indus. Co. v. Zenith
 20 Radio Corp., 475 U.S. 574, 586 (1986); Nissan Fire, 210 F.3d at 1103. The opposing party cannot
 21 “‘rest upon the mere allegations or denials of [its] pleading’ but must instead produce evidence
 22 that ‘sets forth specific facts showing that there is a genuine issue for trial.’” Estate of Tucker v.
 23 Interscope Records, 515 F.3d 1019, 1030 (9th Cir. 2008).

24 The opposing party’s evidence is to be believed, and all justifiable inferences that may be
 25 drawn from the facts placed before the court must be drawn in favor of the opposing party. See
 26 Anderson, 477 U.S. at 255; Matsushita, 475 U.S. at 587; Narayan v. EGL, Inc., 616 F.3d 895, 899
 27 (9th Cir. 2010). While a “justifiable inference” need not be the most likely or the most persuasive
 28 inference, a “justifiable inference” must still be rational or reasonable. See Narayan, 616 F.3d at

899. Summary judgment may not be granted “where divergent ultimate inferences may reasonably be drawn from the undisputed facts.” Fresno Motors, LLC v. Mercedes Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir. 2015). Inferences are not drawn out of the air, and it is the opposing party’s obligation to produce a factual predicate from which the inference may be drawn. See Fitzgerald v. El Dorado Cnty., 94 F.Supp.3d 1155, 1163 (E.D. Cal. 2015); Sanders v. City of Fresno, 551 F.Supp.2d 1149, 1163 (E.D. Cal. 2008). “A genuine issue of material fact does not spring into being simply because a litigant claims that one exists or promises to produce admissible evidence at trial.” Del Carmen Guadalupe v. Agosto, 299 F.3d 15, 23 (1st Cir. 2002); see Bryant v. Adventist Health System/West, 289 F.3d 1162, 1167 (9th Cir. 2002). The parties have the obligation to particularly identify material facts, and the court is not required to scour the record in search of a genuine disputed material fact. Californians for Renewable Energy v. Cal. PUC, 922 F.3d 929, 935-36 (9th Cir. 2019); Simmons v. Navajo Cnty., 609 F.3d 1011, 1017 (9th Cir. 2010). Further, a “motion for summary judgment may not be defeated . . . by evidence that is ‘merely colorable’ or ‘is not significantly probative.’” Anderson, 477 U.S. at 249-50; Hardage v. CBS Broad. Inc., 427 F.3d 1177, 1183 (9th Cir. 2006). If the nonmoving party fails to produce evidence sufficient to create a genuine issue of material fact, the moving party is entitled to summary judgment. Nissan Fire, 210 F.3d at 1103.

In the specific context of a PACA appeal, on summary judgment, the factual findings of the Secretary are prima facie valid and will be accepted by the court as established, unless the findings are rebutted by the opposing party. See Frito-Lay, Inc. v. Willoughby, 863 F.2d 1029, 1033 (D.C. Cir. 1988); Spano v. Western Fruit Growers, 83 F.2d 150, 152 (10th Cir. 1936); Sierra Kiwi, Inc. v. Rui Wen, Inc., 2013 U.S. Dist. LEXIS 160404, *8 (E.D. Cal. Nov. 6, 2013); Genecco Produce, Inc. v. Sandia Depot, Inc., 386 F.Supp.2d 165, 171-72 (W.D. N.Y. 2005). A party may rely on evidence that was presented and considered by the Secretary, as well as evidence that was not presented and considered by Secretary, in order to attempt to rebut the Secretary’s findings and determinations. See Sun Pac. Mktg. Coop. v. Dimare Fresh, Inc., 2010 U.S. Dist. LEXIS 83176, *25-*26 (E.D. Cal. Aug. 13, 2010). A failure to submit any evidence will not rebut the Secretary’s findings and determinations. See Frito-Lay, 863 F.2d at 1034, 1036.

FACTUAL BACKGROUND¹

Around the summer of 2016, Western Veg and Sun Valley began discussions regarding the sale of Sun Valley's avocados. See Ollivier Dec. ¶ 9;² Lym Dec. ¶ 4.³ In August 2016, Western Veg's President David Ollivier ("Ollivier") and salesmen Michael Huston ("Huston") and Dylan Lym ("Lym") met with Sun Valley's Controller Erwin Bartel and Manager Jared Sanders, as well as the proposed avocado growers.⁴ See id. Jared Sanders and Ollivier had known each other for 20 years. DUMF 11. Western Veg had marketed grapes from 2009 to 2012 for a company owned by Jared Sanders called "Jerad R. Sanders Farming., Inc." See DUMF 13, PRDUMF 13. Some of the deals with Western Veg for Jared Sanders's grapes were consignment deals, while others were FOB. See DUMF 13; PRDUMF 13; J. Sanders Depo. 48:13-49:10. However, despite discussions and Ollivier's familiarity with Jared Sanders and Bartel, no avocados appear to have been transferred between Western Veg and Sun Valley in 2016.

On January 6, 2017, Ollivier sent Bartel by e-mail a written consignment agreement to review for the marketing of avocados. See PACA Decision at 19; Ollivier Dec. ¶ 11; DUMF 21.⁵

¹ "DUMF" refers to "Western Veg's Undisputed Material Fact," and "PUMF" refers to "Sun Valley's Undisputed Fact," and "PRUMF" refers to "Sun Valley's Response to Western Veg's Undisputed Fact."

² David Ollivier's declaration was submitted and considered by the Secretary in the parties' PACA proceedings and is Doc. No. 29-8. Ollivier's declaration is Exhibit 8 to Western Veg's Request for Judicial Notice. The Court will consider Ollivier's declaration, but it will not grant judicial notice of the declaration because there is no utility in doing so. No party disputes that Ollivier submitted the declaration in the PACA proceedings, and taking judicial notice of the declaration will not conclusively establish its contents. Cf. In re Oracle Corp. Sec. Litig., 627 F.3d 376, 386 n.1 (9th Cir. 2010) (holding that the content of a deposition is not a clearly established fact for purposes of judicial notice).

³ Dylan Lym's declaration was submitted and considered by the Secretary in the parties' PACA proceedings and is Doc. No. 29-9. Lym's declaration is Exhibit 9 to Western Veg's Request for Judicial Notice. For the same reasons discussed with respect to the Ollivier declaration, the Court will consider Lym's declaration, but will not take judicial notice of it. Cf. In re Oracle, 627 F.3d at 386 n.1.

⁴ The growers at the meeting were not the growers who ultimately supplied the avocados to Sun Valley and Western Veg. See Ollivier Dec. ¶ 9; Lym Dec. ¶ 4.

⁵ Sun Valley objects that DUMF 21 is hearsay and violates Rule of Evidence 1002, the best evidence rule. See PRDUMF 21. As to the hearsay objection, DUMF 21 states that Ollivier sent Bartel a consignment agreement via e-mail, and no more. DUMF 21 is describing an action, not a statement; therefore, DUMF 21 contains no hearsay. See Fed. R. Evid. 801(c). As to the best evidence rule objection, the contents of the e-mail are not described, other than the consignment agreement was an attachment. See DUMF 21. The consignment agreement at issue is part of the parties' PACA proceeding record, see Doc. No. 6 at 84-106, and, importantly, the PACA Decision found Ollivier sent the e-mail to Bartel and stated that the e-mail was an exhibit submitted by Western Veg. See PACA Decision at 19. From the parties' PACA proceeding, it is apparent that the parties are in possession of the e-mail and the Secretary relied on it. Therefore, the Rule 1002 objection is insufficient to undermine the Secretary's findings or DUMF 21.

1 On January 9, 2017, Bartel replied that he was out of town and would print the agreement and get
 2 back to Ollivier the next day. See PACA Decision at 19; Ollivier Dec. ¶ 11; DUMF 22.⁶
 3 However, there is no evidence that Bartel printed the consignment agreement, forwarded the
 4 consignment agreement to anyone at Sun Valley, had authority to accept the terms of the
 5 consignment agreement on behalf of Sun Valley, contacted Ollivier on January 10, 2017, or
 6 otherwise spoke to Ollivier regarding the consignment agreement. Andrew Sanders, a managing
 7 member of Sun Valley, has declared that he never saw the consignment agreement until sometime
 8 after March 2018. See A. Sanders Opposition Dec. ¶ 8.

9 The consignment agreement sent to Bartel by Ollivier (“the CA”) provided for a 10%
 10 commission on sales prices, plus cooling costs, and a harvest advance of 50% of the sales price
 11 less deductions. See Doc. No. 6 at ECF pp. 89-90, 99; PACA Decision at 19; DUMF 26. The CA
 12 provided that Western Veg had authority to act in its sole discretion to resolve quality problems or
 13 consummate sales, and gave Western Veg authority to sell the avocados “F.O.B., Delivered,
 14 Consignment, Re-consignment, Open, Price-After-Sale, Price After Arrival, Joint Account or
 15 Delayed Billing basis.”⁷ Doc. No. 6 at ECF p. 88; DUMF 25. The CA also stated in part: “If
 16 [Sun Valley’s] Fruit is delivered to [Western Veg] after receipt of this [CA], [Sun Valley] will be
 17 deemed to have acquiesced to the terms of this [CA], regardless of whether either or both parties
 18 executed and returned the [CA].” See PACA Decision at 19; Doc. No. 6 at ECF p. 96; DUMF 23.
 19 The CA covered the 2016-2017 growing season. See PACA Decision at 22. No one from Sun
 20 Valley ever signed the CA. See DUMF 28. However, throughout 2017, Ollivier would
 21 sometimes receive calls from Bartel or Jared Sanders to keep in touch and to let Ollivier know that
 22 they were still interested in importing avocados from Mexico. See DUMF 27.

23 In December 2017, Ollivier received a telephone call from Bartel in which Bartel informed
 24

25 ⁶ Sun Valley objects that DUMF 22 violates Rule of Evidence 1002 because no e-mail is found in the record. See
 26 PRDUMF 22. Sun Valley is correct that Western Veg has not submitted the January 2017 e-mail and the contents of
 27 the e-mail are described by DUMF 22. Nevertheless, the PACA Decision found that Bartel sent a reply to Ollivier as
 28 described by DUMF 22 and noted that Western Veg had submitted the e-mail exchange as part of the PACA
 proceeding. See PACA Decision at 19. It is apparent that the parties are in possession of the e-mail and the Secretary
 relied on it. Thus, the Rule 1002 objection does not undermine the Secretary’s findings or DUMF 22.

⁷ Ollivier described this provision as giving Western Veg total marketing authority. See Ollivier Dec. at ¶ 13.

him that Sun Valley had a load of avocados at the Mexico-Texas border. See DUMF 29; PRDUMF 29. On December 20, 2017, December 22, 2017, January 3, 2018, January 10, 2018, and January 15, 2018, Sun Valley shipped a total of six loads of avocados (loads four and five were both sent on January 10) to Western Veg; each of the six loads of avocados graded at U.S. No. 2 grade.⁸ See DUMF’s 36, 38, 40, 42, 44, and 46. The USDA Inspection forms for five of the six loads (all loads except for Load #2) indicate that the avocados are “Don Avocados.” See Doc. No. 6 at ECF pp. 54, 55, 56, 61, 64, 66, 68, 70. Ollivier has declared that during this time, the market was flooded with avocados and finding buyers for U.S. No. 2 grade avocados was extremely challenging, as buyers were even passing on U.S. No. 1 grade avocados. See Doc. No. 28-8 at ¶ 17. Further, potential buyers would not purchase the Sun Valley avocados when the buyers learned that the avocados were “Don Avocados.” See id. Purchasers knew that growers of “Don Avocados” were infamous for not pre-cooling their avocados, which leads to condition and quality defects. See id.

Despite all loads grading at U.S. No. 2 and most of the loads being “Don Avocados,” Western Veg sold all six loads. Western Veg resold Load #1 on December 20, 2017 for \$65,360; resold Load #2 between December 28, 2017 and January 19, 2018 for \$58,678.50; resold Load #3 between January 9, 2018 and January 19, 2018 for \$13,720.52; resold Loads #4 and #5 between January 19, 2018 and January 22, 2018 for \$20,875.50 and \$31,314 respectively; and resold Load #6 on January 19, 2018 for \$38,519.50. See DUMF’s 37, 39, 41, 43, 45, and 47; PACA Decision at ¶¶ 3-20. Upon completion of each of the resales, Western Veg prepared six separate liquidation reports. See id.

For its part, Sun Valley prepared invoices to Western Veg for each of the avocado loads. See Doc. No. 30-5. The invoice for Load #1 is dated December 20, 2017, states that \$88,762 is due, and has the words “FOB Texas” under a box marked “P.O. No.” See id. The invoice for Load #2 is dated December 27, 2017, states that \$90,946 is due, and has the words “FOB Texas” under the “P.O. No.” box. See id. The invoice for Load #3 is dated January 3, 2018, states that

⁸ The USDA Inspection forms for the first load of December 20, 2017, indicate that the avocados were graded at U.S. No. 1 grade. See Doc. No. 6 at ECF pp. 55, 56. However, because Sun Valley admits that the first load graded at U.S. No. 2 grade, see PRDUMF No. 36, the Court accepts that all loads of avocados were U.S. No. 2 grade.

1 \$72,282 is owed, has the words “FOB Texas” under the “P.O. No.” box. See id. The invoice for
 2 Load #4 is dated January 11, 2018, states that \$61,440 is due, and has the words “FOB Texas”
 3 under the “P.O. No.” box. See id. The invoice for Load #5 is dated January 11, 2018, states that
 4 \$68,367 is due, and has the words “FOB Texas” under the “P.O. No.” box. See id. Finally, the
 5 invoice for Load #6 is dated January 11, 2018, states that \$65,333 is due, and has the words “FOB
 6 Texas” under the “P.O. No.” box. See id. Load #6, however, was not actually shipped or graded
 7 until January 15, 2018. See DUMF 46.

8 Shortly after the first load was delivered to Western Veg, Bartel sent Ollivier and Lym a
 9 number of e-mails. On December 21, 2017, Bartel and Ollivier exchanged four e-mails. Bartel
 10 sent Ollivier an e-mail that read: “When this morning will you be transferring funds to [Sun
 11 Valley] for the first load. 50% less your commission. The second load should be arriving today.”
 12 PACA Decision at 12; DUMF 48. Bartel then sent Ollivier a second e-mail that purported to be an
 13 invoice for the first load, with the amount of the invoice listed as \$88,960. PACA Decision at 14-
 14 15; DUMF 49. Ollivier sent Bartel a reply e-mail that read: “Erwin – I will be forwarding what
 15 we sold this load for – its not close to what this invoice reflects – I will be sending lot report
 16 shortly. Wire is on its way.” PACA Decision at 15; DUMF 50. At 2:35 p.m., Bartel sent Ollivier
 17 an e-mail that read: “When you send the lot report, will it show where the avocados were sold?
 18 We need to know that. Based on the wire amount, we are concerned as to the market. We
 19 expected much more from this load.” PACA Decision at 15; DUMF 51. Sometime after Bartel’s
 20 last e-mail, Western Veg provided a detailed account of sale that day. DUMF 52.⁹

21 On December 26, 2017, Bartel sent an e-mail to Ollivier that read: “Any lot report on
 22 [Load #2] that arrived on 12/22/2017?” PACA Decision at 12.

23 On December 27, 2017, Bartel sent an e-mail to Lym that read: “Any Lot Report from
 24 yesterday’s shipment? Transfer of funds today?” PACA Decision at 12. Bartel sent a second e-
 25

26 ⁹ Sun Valley objects that DUMF violates Rule of Evidence 1002 and no document was submitted with the motion that
 27 is consistent with DUMF 52. However, DUMF 52 is supported by the Ollivier Declaration, which is part of the
 28 PACA proceeding record and Western Veg’s Request for Judicial Notice. Further, the best evidence rule does not
 apply because DUMF 52 does not purport to describe the contents of the account of sale, it is merely averring that an
 account of sale was provided. Therefore, Sun Valley’s objections are overruled, and DUMF 52 is established.

1 mail that day to Ollivier, Lym and Huston that read: "Will we receive a lot report and fund
2 transfer today for the load shipped yesterday?" DUMF 53.

3 On December 28, 2017, Bartel sent an e-mail to Lym that read: "Do we have a Lot Report
4 on the 2nd load? 1,920 boxes." DUMF 54.

5 On January 8, 2018, Bartel sent an e-mail to Ollivier and Lym that read: "What is the
6 status of payment on the 1st load? What is the status of advance payment on Load #3 and Load
7 #4? Do you have a lot report on Load #3?" DUMF 55. Ollivier responded to Bartel in an e-mail
8 that read: "First Load – We shipped on the 20th – So final payment will be around the 20th of
9 January – Third Load just shipped – I will pay today half – Don't know when the forth is
10 coming?" DUMF 57. Bartel responded to Ollivier in an e-mail that read: "The 4th load is being
11 shipped this morning. I thought it went last week." DUMF 58.

12 On January 10, 2018, Bartel sent an e-mail to Ollivier, Lym, and Huston that read:

13 Following up with our conversation yesterday with you, Jerad [Sanders] and I. We
14 emphasized the need for communication. We need the projected sales prices each
15 week on avocados. Upon receipt of a load in Texas that meets USDA Inspection,
16 [Western Veg] will advance [Sun Valley] 50% of the projected sales price. [Sun
17 Valley] will be sent a lot sales report with delivery destination immediately after
18 the Load is shipped out. Final settlement will be made on sales in 15-21 days after
shipment. We need accurate accounting of sales with the guideline being USDA
prices as a base. All sales will be fob, not open. [Sun Valley] will forward all
documents to [Western Veg] upon receipt from Grower, Packer, Shipper, Port of
Entry, Inspection, etc. Per our agreement, 10% is more than a fair profit for
structured Funding Agreement.

19 PACA Decision at 15; see also DUMF 60.

20 On January 11, 2018, Lym sent an e-mail to Bartel that read: "We are wiring the advance
21 on load #4 today. I remember the agreement being that we would make final payments on loads at
22 30 days; not 15-21." DUMF 61.

23 On January 22, 2018, Bartel sent an e-mail to Lym that read:

24 Good Afternoon! Received your e-mail from Saturday. The operating cost that we
25 gave you is less than 50% of our cost so your estimated projections are well below
26 our costs. The fruit that we are receiving at the Texas Cold Storage is quality fruit,
27 passes USDA inspection and has also been passing the pressure test. We follow
28 PACA, USDA Market and Market Enforcement Regulations. The fruit is FOB
Texas and not on an open market with protection. Your report of sales is not
acceptable. Your projected estimates are \$10.00 - \$15.00 below USDA Market
Report prices. [Sun Valley] pays [Western Veg] 10% for funding and quality sales

1 of its product, which we have to report to our Affiliates, Associates, and Board
2 Members.

3 PACA Decision at 16; Rumph Dec. Ex. 1; see also DUMF 62.

4 On January 25, 2018, Erwin sent Ollivier and Lym an e-mail that read: “Due on Load #1 -
5 \$29,048.00. Due on Load #2 - \$25,798.06. Please wire funds today.” Rumph Dec. Ex. 3.

6 On January 26, 2018, Ollivier replied to Bartel’s January 25 e-mail and stated: “We are
7 not in a position to wire any more money until we get pricing back from the last loads that were
8 sent out – I am hoping Monday we have pricing. I have sent you 130k and we have not received
9 payment on any of the loads yet – should be coming shortly. We will review on Monday and see
10 what we can do.” Id.; DUMF 63. Bartel sent a reply e-mail to Ollivier the same day and stated:

11 The terms of agreement we have with [Western Veg] is that once you received the
12 product at the Texas Cold Storage and it cleared proper inspection, you would
13 advance 50% of sales FOB Texas. The final payment on each load would be made
14 in 30 days from shipment per PACA Regulations. That means that we should
15 receive final payment on Load #1 and Load #2, as they are both beyond 30 days.
16 All loads past inspection and pressure prior to shipment out of the Texas Cold
17 Storage. Attached are invoices based upon the USDA Market, Dallas, Texas,
18 dated according to inspection dates.

19 PACA Decision at 15; Doc. No. 29-5 at p.36.

20 On January 31, 2018, Bartel sent an e-mail to Ollivier and Lym in which he stated:

21 We don’t understand about problems as we have not been given any evidence of
22 problems, just been told there are problems. All the fruit made good arrival at the
23 Texas Cold Storage and made USDS Inspection. A lot of it was also pressure
24 tested at the Texas Cold Storage and passed. These avocados were all sold FOB,
25 Texas Cold Storage, not on an open market. We have no idea where the fruit went
26 or how it arrived. Each load represents it’s own lot and is not part of a pool. We
27 are now told no further payments will be made until all the product numbers are
28 available. We were also to be given weekly sales projection and were never given
any. There has been no communication. This is not acceptable and we will pursue
alternative action to resolve this matter.

Doc. No. 29-5; see also DUMF 64. Ollivier has declared that he responded to Bartel by stating
that \$130,000 had already been advanced, that the avocados had “hot cores” which accelerated the
maturation process, and that as soon as the returns were obtained the remaining balance would be
paid to Sun Valley. See Ollivier Dec. at ¶ 53.

After filing an informal Complaint in February 2018, Sun Valley filed a formal PACA
Complaint with the USDA against Western Veg for money that Sun Valley believed was owed to

1 it by Western Veg in connection with the sale of the six loads of avocados. See Doc. No. 29-4. In
2 the parties' PACA proceedings, Sun Valley alleged that an oral contract existed for the sale of six
3 truckloads of avocados for an agreed USDA Market Price of \$447,130. See id. Sun Valley
4 alleged that Western Veg owed a remaining balance of \$218,659.98. See id. Sun Valley
5 submitted the declaration of Andrew Sanders and Bartel as part of the PACA proceedings. See
6 Doc. Nos. 29-6, 29-7. Andrew Sanders and Bartel declared that the terms of the verbal agreement
7 between Sun Valley and Western Veg were: (1) avocados would be shipped FOB Texas, where
8 ownership of the avocados would be taken by Western Veg; (2) Western Veg would receive a
9 10% discount on the USDA price at the time upon acceptance of the avocados; and (3) Western
10 Veg would pay 35% up front for each load, with the remainder to be paid within 30 days. See
11 Doc. No. 29-6 at ¶ 2; Doc. No. 29-7 at ¶ 1. Andrew Sanders also declared that he learned after the
12 PACA complaint was filed that Western Veg was claiming that because the avocados involved
13 were "Don Avocados" that this somehow caused an issue, even though all six loads passed
14 inspection by the USDA and were accepted by Western Veg after passing inspection. See id. at ¶
15 3. Bartel also declared in relevant part: (1) Western Veg initially paid 35% commission based
16 upon the USDA price; (2) he was in constant e-mail contact with Western Veg concerning the six
17 loads of avocados; (3) some of the e-mails indicate that the terms were FOB Texas; and (4) he
18 never received e-mails from Western Veg indicating that the terms were not FOB Texas after he
19 sent e-mails indicating that the terms were FOB Texas. See Doc. No. 29-7 at ¶ 2.

20 For its part, Western Veg filed an answer in the PACA proceeding and stated in part that it
21 agreed to market and sell Sun Valley's avocados on a consignment basis, without guaranteed
22 prices, advancing certain sums to Sun Valley, and remitting net sales proceeds to Sun Valley after
23 deducting for advance repayment, materials, cooling, and a 10% commission. See Doc. No. 6 at
24 ECF pp. 36-37. Western Veg answered that it did not agree to any minimum prices or to USDA
25 market prices and that it in fact would never agree to USDA market prices for consignment sales
26 because those prices are inflated with charges such as freight, brokerage fees/commission,
27 handling charges, and other costs. See id. at p. 37.

28 Western Veg also submitted the declarations of Ollivier and Lym. Ollivier declared that

1 the terms of the agreement were that Western Veg would accept six loads of avocados on a
2 consignment bases, advance up to 50% of the estimated sales price, deduct its marketing costs,
3 and take a 10% commission. See Ollivier Dec. at ¶ 4. In response to Sun Valley's rhetorical
4 question of, why would Western Veg advance sums for a consignment sale, Ollivier explained
5 that, since the final prices for a consignment sale are unknown, marketers typically advance a
6 portion of the expected sales proceeds to a grower or importer in order to cover harvesting and
7 shipping costs. See id. at ¶ 6. After the final sales are complete, the marketer provides an account
8 of sale and remits sales proceeds, if any, to the grower or importer. See id. Ollivier contended
9 that if the transactions were truly FOB Texas, then Western Veg would have issued purchase
10 orders, received and accepted the produce, and Sun Valley would have invoiced Western Veg for
11 the FOB Texas price at the time of the alleged acceptance in Texas, but that did not happen. See
12 id. Instead, Ollivier declared that Western Veg inspected the avocados and agreed to market them,
13 upon inspection Western Veg estimated the projected sales and advanced up to 50% to Sun
14 Valley. See id. Ollivier declared that Sun Valley did not invoice Western Veg at the time of the
15 alleged acceptance in Texas. See id. Ollivier declared that Sun Valley recognized that it needed
16 Western Veg's final sales returns, frequently requested the sales return information, and agreed
17 that Western Veg was entitled to a 10% commission. See id. Ollivier declared that although
18 Western Veg characterized the commission in various e-mails as a commission, percentage
19 discount, or profit margin, it remains a commission that a marketing agent or commission
20 merchant typically receives for marketing produce. See id. Ollivier declared that Sun Valley's
21 words/position are contradicted by its actions and industry norms and that if the agreement were
22 truly FOB Texas, Sun Valley would have simply invoiced Western Veg for an agreed fixed price
23 and would not have constantly sought sales returns information, accepted advances, allowed for
24 deductions and commissions, waited for liquidation reports, and/or waited for sales proceeds
25 remittance. See id. at ¶ 7.

26 On October 22, 2020, the USDA issued its findings and decision, in which it found that the
27 agreement between Western Veg and Sun Valley was a consignment agreement and that Western
28 Veg had remitted all sums owed to Sun Valley. See PACA Decision. In part, the USDA decision

1 found:

2 As [Western Veg's] David Ollivier asserts in his affidavit testimony, [Sun
3 Valley's] words are contradicted by its actions. [Sun Valley] repeatedly asserts that
4 [Western Veg] agreed to purchase the avocados FOB Texas at the prevailing prices
5 reported by USDA Market News less a 10% "discount"; however, [Sun Valley]
6 submitted evidence showing that [Bartel] sent multiple email messages to [Western
7 Veg] requesting lot reports and settlement for the avocados. Mr. Bartel also
8 acknowledges in an email message dated January 10, [2018] that the advances paid
9 by [Western Veg] were 50% of the projected sales proceeds, which begs the
10 question as to why [Sun Valley] would accept advances based on projected sales
11 proceeds if the amount [Western Veg] agreed to pay for the avocados was
12 predetermined based on prevailing USDA Market News prices. The obvious
13 answer to the question is that the terms of the agreement were as [Western Veg]
14 asserts, i.e. [Western Veg] would advance 50% of the projected sales proceeds, and
15 upon completion of its resales, [Western Veg] would remit the gross resale
16 proceeds, less advance prepayment, cooling and materials expenses and a 10%
17 commission.

18 As the evidence . . . establishes that the avocados were consigned to [Western
19 Veg], [Western Veg's] liability to [Sun Valley] should be based on the gross
20 proceeds collected from its sales of the avocados, less advance repayment, cooling
21 and material expenses, and the 10% commission agreed upon between the parties.

22 [Western Veg] submitted a detailed account of sales for each of the six shipments
23 of avocados in question, as well as copies of its invoices for the sale of the
24 avocados to its customers, and detailed liquidations showing the advances,
25 expenses, and commissions that were deducted from the gross sales. Those
26 documents show the avocados were sold for gross proceeds totaling \$228,468.02.
27 [Sun Valley] submitted an accounting crediting [Western Veg] with advances,
28 payments, costs, and commissions totaling \$228,470.02. As [Western Veg] has
therefore remitted the full amount owed to [Sun Valley] according to the parties'
agreement, we find that [Sun Valley's] Complaint should be dismissed.

PACA Decision at pp. 22-23.

As part of the briefing in this case, Sun Valley has submitted a declaration by Jared
Sanders. In relevant part, Jared Sanders declares that, in 2016 or early 2017, he and Bartel
negotiated the agreement between Sun Valley and Western Veg for the subject avocado sales. See
J. Sanders Dec. ¶ 2. Jared Sanders explained that they agreed to terms for the sale of avocados to
Western Veg with the following terms: (1) FOB Texas, (2) price would be the USDA price for the
products (Dallas), and (3) Sun Valley would give Western Veg a 10% discount on the price and
full payment would be made within 30 days. See id. Jared Sanders declared that the terms were
agreed to by Jared Sanders and Bartel on behalf of Sun Valley and Ollivier on behalf of Western
Veg. See id. Andrew Sanders also testified that the avocados were sold by Sun Valley to Western

1 Veg “FOB Texas,” but with Western Veg receiving a 10% discount on the FOB price. See A.
 2 Sanders Depo. 33:2-13. Jared Sanders declared that the term “FOB Texas” meant that the cold
 3 storage facility in Texas is where Western Veg would take title and possession of the avocados.
 4 See id. Jared Sanders also declared that in the industry, FOB means “free on board” and that
 5 whatever location is listed after the FOB is the place the buying party obtains title and possession
 6 of the articles being sold. See id. With respect to the e-mails in which Bartel was requesting lot
 7 information from Western Veg, Jared Sanders explains that “[t]his information was requested
 8 because Western Veg was refusing to pay the sales price pursuant to the agreement (full payment
 9 within 30 days). Western Veg used as an excuse for such non-payment that its sales were not
 10 sufficient to cover the expense of the sales price. There was a feeling among myself and
 11 management at the time (December 2017 and January 2018) that this was an excuse, hence
 12 information to support his claim was requested.” Id. at ¶ 3. Finally, Jared Sanders explains that
 13 the agreement provided a “10% discount” to Western Veg, but people who worked for Sun Valley,
 14 including Bartel, often referred to the discount by various names, including “commission” and
 15 “profit.” Id. at ¶ 4.

16 Sun Valley has presented no new declarations, depositions, or e-mails from Bartel.
 17 Regrettably, Bartel died in early 2022. See A. Sanders MSJ Dec. ¶ 5.

18 19 **DEFENDANT’S MOTION**

20 *Defendant’s Arguments*¹⁰

21 Western Veg argues that the PACA Decision should be upheld and that the Decision’s
 22 findings are determinative. It is Sun Valley’s burden to sufficiently rebut the findings and
 23 determinations of the PACA Decision. Any reliance on the declarations of Andrew Sanders and
 24 Bartel that were submitted during the PACA proceedings is improper because the declarations
 25 were not sworn, contrary to USDA rules. Further, Sun Valley cannot produce sufficient rebuttal

26
 27 ¹⁰ Western Veg argued in part that Sun Valley was a suspended LLC, which means that it cannot defend this action.
 28 However, Sun Valley paid the appropriate fees to the California Secretary of State and is now in good standing. As
 such, there are no longer any relevant issues regarding Sun Valley’s status as an LLC. See Cadle Co. v. World Wide
Hospitality Furniture, Inc., 144 Cal.App.4th 504, 512 (2006); Gar-Lo, Inc. v. Prudential S&L Assn., 41 Cal.App.3d
 242, 244 (1974); Doc. No. 31.

1 evidence because Bartel is deceased and he was the only person at Sun Valley who had firsthand
2 knowledge of the transactions with Western Veg. Further, the PACA decision reflects the
3 USDA's knowledge and expertise of PACA and the problems and practices within the produce
4 industry. Finally, Western Veg requests attorneys fees under 7 U.S.C. § 499g(c).

5 In reply, Western Veg argues in part that its prior four year course of dealing with Jared
6 Sanders all involved consignments, and Jared Sanders was a member or manager of Sun Valley.
7 This course of dealing indicates that the agreement in this case was a consignment.

8 Western Veg also replies that it did not agree or admit that the agreement was FOB Texas.
9 Western Veg contends that it objected within two hours of receiving the first alleged FOB Texas
10 invoice by saying that the sales returns were no where close to the \$89,000 invoice and that the
11 sales report would be forwarded that day. Bartel replied by expressing concern over market
12 conditions. The detailed account of the sale was provided to Sun Valley that day. Further,
13 Western Veg contends that there is no evidence that Sun Valley sent invoices 2 through 6 around
14 the dates of those invoices, notes that invoice 6 is dated January 11 even though Load #6 was not
15 sent until January 15, and avers that invoices 2 through 6 were not received until February 2018.

16 Plaintiff's Opposition

17 Sun Valley argues that the key issue is whether the agreement in this case was a
18 consignment agreement or one in which the avocados were sold to Western Veg FOB Texas. If
19 the latter, the risk of any loss from a failure to sell falls on Western Veg because title changed
20 hands to Western when it took possession of the avocados in Texas. Whether a transaction is a
21 sale or consignment is determined by examining the intent of the parties, and matters of intent are
22 typically factual matters that are unsuited to summary judgment.

23 Sun Valley argues that Bartel's declaration in the PACA proceedings, as well as e-mails he
24 sent to Ollivier or Lym, contain references to the agreement being "FOB Texas." Western Veg
25 did not contradict the assertion that the agreement was FOB Texas, which is an admission by
26 silence that the terms of the agreement were FOB Texas. Further, Jared Sanders also participated
27 in the negotiations of the terms of the agreement with Western Veg, and he has confirmed that the
28 terms of the agreement were FOB Texas using the USDA prices for avocados.

1 Sun Valley also argues that its invoices and Western Veg's documents indicate a sale of
2 avocados and not a consignment. USDA prices are reflected in the six invoices sent to Western
3 Veg by Sun Valley for the six loads of avocados. Sun Valley contends that the fact that it
4 submitted invoices indicates a sale because if the agreement were really a consignment, Sun
5 Valley states that it would have simply waited for the sales reports and obtained its percentage.
6 Further, Western Veg admits that it was paying 50% after receipt of each loads, with the
7 remainder due in 30 days. This indicates a sale because 50% can be easily calculated based on the
8 agreed upon price. If a consignment were involved, then it unknown how to appropriately glean
9 50% because the sale had not yet occurred.

10 Finally, Sun Valley argues that Bartel's e-mails in which he requested lot reports does not
11 show that the transaction was a consignment. Sun Valley avers that Western Veg indicated that it
12 was not making timely payments due to slow sales. That is, Western Veg was holding funds owed
13 based on alleged poor sales. It is natural to want to see the lot reports to see if it would be paid the
14 sales price agreed or to see if litigation would be necessary. This is what Bartel's January 31,
15 2018 e-mail states in which litigation was threatened. If a consignment agreement were really
16 involved, then Sun Valley states that it would have to wait for sales reports and an accounting
17 before it would be entitled to payment or be able to threaten litigation. Further, when Ollivier
18 responded to Bartel's e-mail that Western Veg has 30 days to pay the balance as discussed earlier,
19 Ollivier implicitly agrees that there was a sale. If the agreement was a consignment, Ollivier
20 would not know if a balance would be required because the avocados may not even be sold,
21 which would leave no balance due and owing. However, with a sale of avocados FOB Texas,
22 there would always be a balance due and owing for each load.

23 Legal Standards

24 In California, a consignment transaction "is one in which the merchant takes possession of
25 goods and holds them for sale with the obligation to pay the owner for the goods from the
26 proceeds of a sale by the merchant." Fariba v. Dealer Servs. Corp., 178 Cal.App.4th 156, 164-65
27 (2009); Bank of Cal. v. Thorton-Blue Pacific, Inc., 53 Cal.App.4th 841, 847 (1997). In a
28 consignment sale agreement, "title to the goods generally remains with the original owner."

1 Fariba, 178 Cal.App.4th at 165; Bank of Cal., 53 Cal.App.4th at 847. That is, a consignment of
 2 goods for sale is a form bailment that does not effect a sale or the passage of title between the
 3 consignor and the consignee. See Martini E Ricci Iamino S.P.A. – Consortile Societa Agricola v.
 4 Trinity Fruit Sales Co., 30 F.Supp.3d 954, 966 (E.D. Cal. 2014).

5 In California, “FOB” means “free on board,” which is a term associated with the sales of
 6 goods. See Cal. U.C.C. §§ 2101, 2102, 2105, 2106(1), 2108, & 2319(1). When an agreement
 7 contains an FOB destination term, this is a delivery term in which the “seller must at his own
 8 expense and risk transport the goods to that [destination] and there tender delivery of [the goods].”
 9 Cal. U.C.C. § 2319(1)(b). In the absence of contrary language in the agreement, a contract for
 10 FOB destination means “title [to the goods] does not pass until the goods have arrived at [the
 11 agreed] destination.” Standard Oil Co. v. Johnson, 24 Cal.2d 40, 46 (1944); see Santa Clara Sand
 12 & Gravel Co. v. State Bd. of Equalization, 225 Cal.App.2d 676, 681-82 (1964); Lewis v. Farmer’s
 13 Grain & Milling Co., 52 Cal.App. 211, 213-14 (1921).

14 The intent of the parties determines whether a transaction is a bailment/consignment or a
 15 sale. See Consolidated Accessories Corp. v. Franchise Tax Bd., 161 Cal.App.3d 1036, 1040
 16 (1984); Northern Counties Bank v. Earl Himovitz & Sons Livestock Co., 216 Cal.App.2d 849,
 17 859 (1963). The entire contract and the parties actions must be considered in determining whether
 18 an agreement was for a sale or a consignment. Consolidated Accessories, 161 Cal.App.3d at
 19 1040. Factors that may be considered are: (1) suggestion and contemplation of consignment in
 20 the memorandum of the agreement between the parties; (2) lack of obligation on the part of the
 21 “consignee” to pay for unsold goods; (3) obligation of the consignee to pay for goods when sold
 22 by him; (4) prompt remittance to consignor for goods sold, whether for cash or credit; (5) visits to
 23 consignee to inquire into sales and urge prompt remittance of collections to consignor; (6) keeping
 24 by a representative of the consignor of an account or inventory of goods consigned and sold; and
 25 (7) provision for return of merchandise upon termination of the agreement. Id. at 1040-41.

26 Discussion

27 The parties appear to agree that the key issue in this case is the nature of the agreement for
 28 the avocados. Western Veg contends that the agreement was a consignment as found in the PACA

1 decision, while Sun Valley contends the agreement was for a sale FOB Texas. To rebut the PACA
2 decision, Sun Valley relies on the PACA proceeding declarations of Bartel and Andrew Sanders
3 and the deposition testimony of Jared Sanders which all indicate that the terms of the agreement
4 included the sale of avocados to Western Veg “FOB Texas,” with a percentage due on receipt, and
5 a 10% discount paid to Western Veg. Additionally, there are four e-mails from Bartel that
6 reference some form of an FOB sale: on January 10, 2022, Bartel stated in part that “All sales will
7 be fob, not open”; on January 22, 2022, Bartel stated in part that the “fruit is FOB Texas and not
8 on an open market with protection”; on January 26, 2022, Bartel stated in part that Western Veg
9 “would advance 50% of sales FOB Texas”; and on January 31, 2022, Bartel stated, “These
10 avocados were all sold FOB, Texas Cold Storage, not on an open market.”

11 With respect to the PACA declarations of Andrew Sanders and Bartel, Western Veg
12 contends that these declarations do not comply with USDA regulations and should be disregarded.
13 However, whether the declarations comply with USDA regulations is irrelevant in this proceeding.
14 The proceeding in this Court is a trial *de novo*, see 7 U.S.C. § 499g(c); Tray-Wrap, Inc. v. Six L’s
15 Packing Co., 984 F.2d 65, 66 (2d Cir. 1993), which “is not a genuine ‘review’ action” of the
16 PACA Decision. Exportal Ltda. V. U.S., 902 F.2d 45, 49 (D.C. Cir. 1990). The Court may
17 consider both evidence that was submitted and not submitted during the PACA proceeding in
18 order to determine whether Sun Valley has adequately rebutted the PACA Decision findings. See
19 Sun Pac., 2010 U.S. Dist. LEXIS 83176 at *25-*26; see also Georgia Vegetable Co. v. Relan, 731
20 F.2d 798, 802 (11th Cir. 1984) (“In a trial *de novo* evidence in addition to that introduced before
21 the Secretary *may*, of course, be offered and considered in the *de novo* trial.” (emphasis added)).
22 Moreover, as Sun Valley correctly points out, the declarations meet the requirements of 28 U.S.C.
23 § 1746 as they are attested under penalty of perjury. Therefore, the Court will consider the
24 declarations in deciding Western Veg’s motion for summary judgment. See 28 U.S.C. § 1746(2);
25 LNS Enters. LLC v. Continental Motors, Inc., 22 F.4t h 852, 858 (9th Cir. 2022); Shepard v.
26 Quillen, 840 F.3d 686, 687 n.1 (9th Cir. 2016).

27 Nevertheless, while the Court will consider the PACA declarations of Bartel and Andrew
28 Sanders, and those declarations do support the position that the sale was FOB Texas, there is a

1 concern. These declarations use identical language to describe the agreement and both
2 declarations state that Western Veg was to forward 35% of the sales price with the remainder to be
3 paid within 30 days. However, no e-mail or any other evidence indicate or support the assertion
4 that 35% was to be paid immediately to Sun Valley. The 35% figure is contrary to both the terms
5 found by the PACA Decision and the e-mails that Bartel sent to Western Veg. Further, Sun
6 Valley in its briefing before this Court does not argue that a 35% advance payment was part of the
7 terms of the agreement or address Western Veg's assertion that Bartel's and Andrew Sanders's
8 PACA declarations are inconsistent with other evidence and other positions taken by Sun Valley.
9 Instead, Sun Valley's briefing seems to accept that a 50% advance was the agreement, which is
10 consistent with Bartel's e-mails and the PACA Decision. Given these considerations, the assertion
11 that a 35% advance was part of the parties' agreement undermines the credibility of the Bartel's
12 and Andrew Sanders's PACA declarations

13 With respect to Bartel's e-mails, Sun Valley argues that because Western Veg never
14 challenged Bartel's assertions that the agreement was FOB Texas, Western Veg's silence is an
15 adoptive admission that the terms of the agreement were FOB Texas. "Before admitting a
16 proffered admission by silence under Fed. R. Evid. 801(d)(2)(B), the district court must first find
17 that sufficient foundational facts have been introduced for the jury reasonably to conclude that the
18 defendant did actually hear, understand, and accede to the statement. Once admitted, the jury
19 decides whether the defendant actually heard, understood, and acquiesced in the statement."
20 United States v. Monks, 774 F.2d 945, 950 (9th Cir. 1985). An admission by silence can apply
21 with respect to oral and written statements. Boerner v. United States, 117 F.2d 387, 390-91 (2d
22 Cir. 1941); 5 Weinstein's Fed. Evid. § 801.31[d]. Particularly when parties are engaged in a
23 business relationship and have engaged in mutual correspondences, the failure to reply to a writing
24 that contains statements for which it would be natural under the circumstances for the
25 recipient/addressee to deny if he believed the statements to be untrue may constitute an admission
26 by silence. Megarry Bros., Inc. v. United States, 404 F.2d 479, 488 (8th Cir. 1968); see also 5
27 Weinstein's Fed. Evid. § 801.31[d].

28 The Court agrees that the various references to FOB or FOB Texas in Bartel's e-mails

1 could be viewed by the jury as admissions by silence. Western Veg and Sun Valley were clearly
2 engaged in a business relationship regarding the avocados and regularly communicated through e-
3 mail. Cf. Megarry Bros., 404 F.2d at 488. At least once before three of the avocado loads were
4 received, and then three times after all loads were received, Bartel stated that the terms were either
5 FOB or FOB Texas and not an open market. In response to Bartel's January 10, 2018 e-mail and
6 an assertion as to when full payment was due, Lym corrected Bartel on January 11 that final
7 payment was due after 30 days, not 15 to 21 days. See DUMF 61. However, there are no e-mails
8 in which Western Veg personnel clearly stated that the agreement was a consignment and that
9 FOB or FOB Texas was not part of the agreement. Considering the parties' apparent agreement as
10 to the effect of an FOB Texas term, i.e. transforming the agreement into a sale of avocados to
11 Western Veg as opposed to a consignment agreement, and considering that Lym did resist at least
12 one other inaccurate term, it could reasonably be expected that Western Veg would object to any
13 of Bartel's references to FOB or FOB Texas. See Megarry Bros., 404 F.2d at 488; 5 Weinstein's
14 Fed. Evid. § 801.31[d]. While it is true that Ollivier stated in the December 21, 2017 e-mail
15 exchange that the invoice did not come close to the sales price obtained by Western Veg, the e-
16 mail did not actually address the term FOB. Viewing Ollivier's e-mail in the light most favorable
17 to Sun Valley as the non-moving party, the e-mail can reasonably be viewed as complaining about
18 the amount of the invoice as opposed to a particular term of the agreement. Therefore, the failure
19 to deny the FOB or FOB Texas terms (or any other terms identified by Bartel) in Bartel's e-mails
20 could be viewed as an adoptive admission by a jury. See Fed. R. Evid. 801(d)(2)(B); Monks, 774
21 F.2d at 950; Megarry Bros., 404 F.2d at 488; 5 Weinstein's Fed. Evid. § 801.31[d].

22 In terms of the seven *Consolidated Accessories* factors, some factors support the existence
23 of a sales transaction, while other support the existence of a consignment agreement. First, there
24 was no formal memorandum regarding the agreement between the parties. Although a CA was
25 sent to Bartel in January 2017, the PACA Decision found that the CA was inapplicable because it
26 involved a different growing season than the avocados at issue. See PACA Decision at 22.
27 Western Veg has not demonstrated that this finding was erroneous. Second, there is no indication
28 that the parties made arrangements or set conditions for a return of any unsold avocados at the

1 termination of the agreement, nor has there been evidence regarding obligations for any “unsold”
2 avocados. In fact, that final payment of all outstanding funds was due 30 days after receipt
3 indicates that there was no contemplation for “unsold” avocados at all, which can be viewed as
4 indicative of a sale. Third, there is no evidence that Sun Valley kept a ledger of avocados
5 consigned and avocados sold. Rather, the only evidence of Sun Valley’s records indicates
6 invoices for the sales of avocados to Western Veg. Fourth, in terms of payment, the parties’
7 conduct shows that funds were advanced/sent by Western Veg to Sun Valley upon Western Veg’s
8 shipment of the avocados to Texas. Western Veg then had 30 days in which to remit all remaining
9 funds, less certain expenses and less 10% for a “commission” or “discount” (depending on which
10 party is describing the nature of the 10%). This payment structure does not necessarily seem
11 consistent with a “prompt remittance” for goods sold, and it does not create an obligation to pay
12 only when or if the avocados were sold. Rather, it seems to create an obligation by Western Veg
13 to pay. Finally, while there is no evidence that Sun Valley made trips to any Western Veg facility
14 (either in California or Texas), Sun Valley nevertheless made a number of inquiries regarding
15 sales/lot reports and urged prompt remittance of money from Western Veg for the avocados. As
16 found in the PACA Decision, this particular aspect of Sun Valley’s conduct can certainly be
17 viewed as indicative of a consignment. Although Sun Valley argues that Bartel was requesting lot
18 reports because Western Veg was delaying full payment within 30 days due to alleged poor sales,
19 see Jared Sanders Dec. ¶ 3, that does not follow the e-mail timeline. Bartel asked for lot reports
20 on December 21, 2017, December 26, 27, and 28, 2017, January 8, 2018, and January 10, 2018.
21 For each of these dates, the only funds due would be 50% since none of these dates are 30 days or
22 more from shipment (or receipt) of any avocado load. Not until January 19 or 20, 2018, would
23 full payment on Load #1 become due. Therefore, the request for lot reports and payment can be
24 viewed as consistent with a consignment, rather than a sale.

25 Additionally, as part of the parties’ conduct, at least three e-mail exchanges are significant.
26 First, on January 10, 2018, Bartel sent an e-mail that followed up on conversations between
27 Western Veg personnel (Ollivier, Lym, and Huston) and Sun Valley personnel (Bartel and Jared
28 Sanders). See PACA Decision at 15. As quoted above, Bartel indicates that Sun Valley needs

1 “projected sales prices each week on avocados,” Western Veg was to advance 50% of the
2 projected sales, Sun Valley was to be sent a lot sales report with delivery destination immediately
3 after a load shipped, and that final settlement would be made 15 to 21 days after shipment. See id.
4 Bartel stated that Sun Valley needed accurate accounting of sales “with the guideline being USDA
5 price as a base. All sales will be fob, not open.” Id. The e-mail concluded by stating, “Per our
6 agreement, 10% is more than a fair profit for a structured Funding Agreement.” Id.

7 As emphasized by the PACA Decision, requests regarding projected sales are consistent
8 with a consignment. However, the January 10 e-mail mentions that the sales are “fob, not open
9 market” which could refer to future sales made by Western Veg to third parties, or could refer to a
10 sale by Sun Valley to Western Veg. Further, the January 10 e-mail states that the guideline for
11 sales would be the “USDA price as a base.” This suggests any sales price would be expected to be
12 near a published USDA price. However, the PACA decision made no findings regarding any form
13 of USDA pricing or the significance of the e-mail’s reference to USDA pricing. Reference to the
14 USDA pricing as the base or guideline is consistent with a consignment because the consignor has
15 the authority to set pricing. See Martini E Ricci, 30 F.Supp.3d at 966. However, reference to
16 USDA pricing as a base or guideline could also be consistent with a form of sale to Western Veg
17 in that a “floating price” could be contemplated. That is, Western Veg would take title to the
18 avocados and advance 50% of a projected USDA guided price, but then have additional time to
19 sell the avocados at, above, or slightly below the USDA guideline price, with Western Veg’s re-
20 sale price (i.e. the price Western Veg sold the avocados to a third party) becoming the actual sales
21 price from Sun Valley to Western Veg.

22 Second, on January 22, 2018, Bartel sent Lym an e-mail that in part described the
23 transaction. Bartel stated that the avocados were “FOB Texas and not an open market with
24 protection.” PACA Decision at 16. Bartel then explained that the report of sales were not
25 acceptable and that the “projected estimates are \$10.00 - \$15.00 below USDA Market Report
26 prices. [Sun Valley] pays [Western Veg] 10% for funding and quality sales of its products”
27 Id. This e-mail clarifies that the sales are FOB Texas, not open market, and is consistent with the
28 January 11 e-mail. With the addition of “Texas” after “FOB,” as well as the rejection of an “open

1 market” sale, this language is consistent with a sale to Western Veg. The e-mail also emphasizes
2 the importance of USDA prices and a complaint that Western Veg’s projected sales were
3 significantly below those listed prices. Finally, the e-mail clarifies that Sun Valley pays Western
4 Veg 10% for two services: funding (which the Court takes to mean funding for transport and
5 growing expenses, see Ollivier Dec. at ¶ 6) and “quality sales.” Paying another person to sell
6 goods clearly supports a consignment transaction. However, it may also support a “floating price”
7 as discussed above, because the greater Western Veg’s re-sales are, the greater the 10%
8 discount/profit will be.

9 Third, Bartel’s January 26, 2018 e-mail to Ollivier explained that, once the avocados
10 arrived in Texas and cleared inspection, Western Veg was to advance “50% of sales FOB Texas”
11 with “final payment on each load [due] 30 days from shipment[.]” See PACA Decision at 16.
12 The e-mail then stated that it attached invoices “based upon the USDA Market, Dallas, Texas,
13 dated according to inspection dates.” Id. Asserting that there were sales “FOB Texas,” and then
14 attaching invoices based on USDA market rates for Dallas, Texas are consistent with some form
15 of sale to Western Veg based on USDA rates.

16 Finally, apart from the e-mails, but in relation to the parties’ conduct, Sun Valley does not
17 contend that Western Veg failed to pay the first 50% in a timely fashion. However, none of the
18 money advanced by Western Veg was consistent with what amounts to 50% of the invoices
19 prepared by Sun Valley. All amounts forwarded by Western Veg were significantly below 50% of
20 Western Veg’s invoices, and thus, well below what Sun Valley believed the relevant USDA
21 market price to be (assuming that Western Veg’s invoices reflected USDA market prices). Based
22 on the e-mails submitted, Sun Valley only complained about the amount of the advanced price
23 with respect to Load #1. Not until half of the loads had been shipped did Sun Valley hold talks
24 with Western Veg, which resulted in the January 10, 2018 e-mail. It was only on January 26,
25 2018, after all loads had been shipped and delivered, that Sun Valley formally complained in
26 writing about prices used or obtained by Western Veg. Conversely, when Bartel sent Ollivier an
27 invoice for the first load of avocados on December 21, 2017, Ollivier did not complain about
28 receiving the invoice per se. Instead, Ollivier responded that the re-sale price was significantly

1 less than the invoiced price. Further, there are no e-mails in response to Bartel's January 26 e-
2 mail and the purported invoices that were attached. Receiving invoices for a particular amount
3 due is more consistent with a sale than a consignment.

4 Under the PACA review framework, this proceeding is a trial *de novo*, it is not a review to
5 ensure that the PACA Decision is support by substantial evidence (for example). The findings in
6 the PACA Decision are *prima facie* valid and are enough by themselves to meet Western Veg's
7 initial burden on summary judgment. Nevertheless, during summary judgment, the Court is
8 required to credit Sun Valley's evidence and make all reasonable inferences in Sun Valley's favor.
9 Narayan, 616 F.3d at 899. So viewing the evidence and the PACA Decision's findings, the Court
10 concludes that a reasonable jury could reject the finding of the Secretary that the agreement was a
11 straight consignment agreement and that no other money is due to Sun Valley.

12 As the Court has endeavored to describe above, the *Consolidated Associates* factors are a
13 mixed bag, some of the factors support a sale and some support a consignment. Similarly, the e-
14 mail exchanges have aspects to them that are supportive of a sale to Western Veg, but also have
15 aspects that are supportive of a consignment to Western Veg. Importantly, as Sun Valley points
16 out, there are no e-mails or any other evidence that clearly or definitively disavow key descriptions
17 of the agreement by Bartel, particularly the "FOB" or "FOB Texas" terms. In fact, the only term
18 that any Western Veg representative clearly questioned was the timeframe for final payment (30
19 days instead of 15 to 21). Under *Megarry Bros.*, a jury could find that Western Veg's silence was
20 an admission that the terms were as described in Bartel's e-mails. Thus, while the evidence and
21 conduct of the parties could support a finding that the transaction was a mere consignment, it
22 could also support a finding that some form of sale to Western Veg was involved. In other words,
23 divergent inferences and conclusions are possible and a reasonable jury could reach a different
24 conclusion than the PACA Decision regarding the nature of the agreement between the parties.

25 Further, if the jury finds a transaction that is different from that found by the Secretary, the
26 decision that no other funds were owed to Sun Valley becomes infirm. The PACA Decision did
27 not rely on or discuss USDA market prices, or the portions of Bartel's e-mails in which USDA
28 market prices are identified. The e-mails indicate that the USDA market prices were to be at least

1 a base or guideline price, and there appears to be no dispute that the sale prices obtained by
2 Western Veg were materially less than any relevant USDA published price. The USDA market
3 price would be relevant to addressing any prices that may have been agreed by the parties (either
4 in terms of a consignment or a sale), or in setting the amount of a what a reasonable sales price
5 would be if a jury determines that the parties agreed to a sale to Western Veg, but did not agree on
6 a sales price for the avocados.

7 In sum, the evidence is not so clear that the Court can hold that all of the relevant PACA
8 Decision's findings remain valid and established, nor is the evidence so clear that the only
9 reasonable inferences that can be drawn all support Western Veg. Under such circumstances,
10 summary judgment must be denied. See Fresno Motors, 771 F.3d at 1125.

11
12 **ORDER**

13 Accordingly, IT IS HEREBY ORDERED that Western Veg's motion for summary
14 judgment (Doc. No. 28) is DENIED.

15 IT IS SO ORDERED.

16 Dated: October 27, 2022

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18 SENIOR DISTRICT JUDGE
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